Astro Shapes, Inc., Astro Coatings, Inc. *and* Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 377. Case 8–CA–26199

July 14, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND TRUESDALE

On March 27, 1995, Administrative Law Judge Robert T. Wallace issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party each filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(1) of the Act by unlawfully soliciting employee Patton to resign, we find it unnecessary to rely on his finding that Patton was wearing a union hat and T-shirt when Supervisor Hoover solicited his resignation. Further, in adopting the judge's finding that the Respondent was aware of the prounion stance of the three discriminatees, we find it unnecessary to rely on the ''small plant rule.''

In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(3) by suspending and discharging the three discriminatees, we find it unnecessary to rely on the drug tests taken by each of the discriminatees subsequent to their discharges. Also, we note that at one point in his decision, the judge stated that Supervisor Hoover did not inform higher management about the incident in which he allegedly saw the three discriminatees hastily leave a breakroom that smelled of marijuana until ''at least 4 hours'' after the incident, and at another point the judge stated that Hoover told higher management about the incident ''3 hours'' after the event. We note that although the record is inconclusive regarding the exact time when Hoover informed higher management of the alleged incident, the record indicates that it was at least several hours after the event.

[2] Although the judge found that the Respondent had unlawfully suspended the three discriminatees before it unlawfully discharged them, he failed to include in the cease-and-desist provisions of his recommended Order any specific reference to the suspensions. Thus, we shall modify his recommended Order and notice to reflect the fact that the Respondent also unlawfully suspended the discriminatees.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Astro Shapes, Inc., Astro Coatings, Inc., Struthers, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(c).

''(c) Suspending, discharging, or otherwise discriminating against employees for supporting Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 377, or any other union.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT suspend, discharge, or otherwise discriminate against any of you for supporting Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 377, or any other union.

WE WILL NOT engage in unlawful surveillance of your protected union activities.

WE WILL NOT ask you to resign rather than seek union representation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Robert Stipetich, Ralph Davila, and Charles Patton immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL notify each of them that we have removed from our files any reference to their suspensions and discharges and that those unlawful actions will not be used against them in any way.

ASTRO SHAPES, INC., ASTRO COATINGS, INC.

Thomas M. Randazzo, Esq., for the General Counsel.
Dean E. Westman and *John W. McKenzie, Esqs.*, for the Respondent.[1]
Timothy R. Piatt, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT T. WALLACE, Administrative Law Judge. This case was tried in Youngstown, Ohio, on October 3–5, 1994,[2] The charge was filed on March 4 and the complaint issued on April 18.

At issue is whether Respondent violated Section 8(a)(1) of the National Labor Relations Act by surveillance of union activities and by soliciting resignations of union supporters. Also at issue is whether it violated Section 8(a)(3) by discharging three employees because of their union activism.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent fabricates and applies coatings to aluminum extrusions at a plant in Struthers, Ohio, from which it annually ships goods valued in excess of $50,000 directly to points in other States. It admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The owners and executive officers of Respondent are President Robert Cene Sr., his two sons Paul Cene and Robert Cene Jr., who are vice presidents in charge, respectively, of overall operations and human resources, and Vice President James DiBacco who is responsible for administration. The plant has a total of approximately 190 hourly employees working on 3 shifts.

A campaign to organize Respondent's work force in 1991 failed when the Union lost an election. A new drive began in the fall of 1993, and, as in 1991, Respondent on learning of the effort promptly held meetings with its supervisory personnel[3] to explain the ''do's and don'ts'' of dealing with employees under applicable labor laws. And in a letter dated October 6, 1993, employees were advised of its opposition to unionization.

Robert Stipetich, Ralph Davila, and Charles Patton were each employed by Respondent for over 6 years prior to their alleged discriminatory discharges on January 11. They worked on the first (7 a.m. to 3 p.m.) shift in a building called ''Press #2'' and regularly operated on or worked in close proximity to metal cutting machines that were extremely dangerous to life and limb unless great care was exercised. Their immediate supervisor was Foreman James Chise. Respondent offers no criticism of their job performance.

The three employees were active union supporters during the 1993 campaign. Stipetich and Patton were members of the Union's organizing committee and all three openly urged other employees to sign union authorization cards in breakrooms and on the plant floor, often in the presence of supervisory personnel. Robert Cene Jr. admits he knew or suspected that Stipetich and Patton were union supporters, and Paul Cene, in connection with the 1991 campaign, states that a number of people kept him informed of the activities of the then principal union activist, Tony Sevi.[4] In these circumstances, I conclude that Respondent was aware of the prounion stance of the three individuals prior to the pertinent events detailed below, and this apart from an inference warranted under the ''small plant rule'' cited in *Health Care Logistics*, 273 NLRB 822 (1984).

B. *Surveillance*

On a workday in late October 1993 a number of hourly employees and Maintenance Supervisor Ray Vasvari were present in a breakroom. Stipetich stood up and announced that there would be a meeting after work that day at a nearby local tavern for anyone interested in learning about the benefits of union membership.

Shortly after 3 p.m., Stipetich and other employees arrived at the tavern parking lot where they immediately noticed Vasvari's Astro Shapes truck parked just outside the entrance. Because of that development they held the meeting at another facility. For his part, Vasvari explains that he went to the tavern because he was ''extremely curious'' about how many employees would show up. He admits seeing at least three employees there.

The situation patently constitutes unlawful surveillance of union activities, as alleged in paragraphs 8 and 11 of the complaint. Supervisor Vasvari's intentional presence at the site of the union meeting was unjustifiably intrusive and coercive.

C. *Soliciting Resignations*

Also in October Patton, at his work station and wearing a Teamsters hat and T-shirt, availed himself of an opportunity to discuss advantages of unionization with a newly hired employee. Overhearing the conversation, Supervisor

[1] Because the two named entities admittedly constitute a single-integrated enterprise, both are included in the term ''Respondent'' for purposes of this decision.

[2] All dates are in 1994 unless otherwise indicated.

[3] Although Respondent admits that its foremen are statutory supervisors within the meaning of Sec. 2(11) of the Act, internally it makes a distinction between foremen and supervisors with the latter having higher status.

[4] Sevi continues to be employed by Respondent.

Derek Hoover[5] interrupted, and addressing Patton said, ''If you don't like working here, you can get a job somewhere else.'' Patton received a similar admonition a month later from Foreman Harklerode. Patton had been going from one work station to another promoting unionization by showing groups of employees that their counterparts at a nearby aluminum fabricating plant earned substantially higher wages. After following Patton across the length of the plant, Harklerode told him, ''If you don't like working here, go work in a union shop.'' Patton's account is not disputed by either supervisor.

Crediting Patton, I find the statements to be unlawful solicitations to resign rather than seek union representation, as alleged in paragraphs 8, 9, and 11 of the complaint. Patton was given alternatives that are incompatible with employee rights under the Act.

D. *Discharges*

Friday, December 17, 1993, was the last workday before a scheduled 2-week holiday plant shutdown. On that day in the lunchroom Patton told employees in the presence of Foreman Chise that there would be an NLRB election shortly after the plant reopened in January.

On January 11 Stipetich, Davila, and Patton were fired based on Manager Cene Jr.'s determination that they had used marijuana at the plant on Thursday, January 6. His decision was based on information provided by Supervisor Hoover.

Hoover testified that on entering the work area about 7:30 a.m. on January 6 he was told by Head Saw Operator Larry Nicula that another employee (Ken McLaughlin) had fallen and injured his shin. Hoover assisted McLaughlin toward a nearby ''nonsmoking'' breakroom where icepacks were available.[6] As they approached within 4 or 5 feet of the lunchroom door, three individuals with cigars in their mouths ''came out in a rush'' heading for the work floor. Hoover recognized them as Stipetich, Patton, and Davila.

On entering the breakroom with McLaughlin, Hoover noted that the lights were out and that there was a strong odor of marijuana. After attending to McLaughlin's injury, he accompanied the latter to his office, where he completed and had McLaughlin sign an accident report.

Later in the day Hoover told Manager Robert Cene Jr. about having smelled marijuana in the darkened breakroom just after the hurried exit of Stipetich, Patton, and Davila.[7] Cene Jr. instructed him to ''monitor'' the three individuals and then, after seeking out Managers DiBacco and Paul Cene told them he suspected the three of smoking marijuana on the premises. He took no further action that day although Hoover assertedly reported at least three more instances of sighting Stipetich, Patton, and Davila together in the breakroom for 5 to 10 minutes at a time with the lights out and of smelling heavy disinfectant there after they left.

Hoover also states that early on the morning of January 7 he looked over at the window of the nonsmoking breakroom. He observes that the light inside ''was off . . . and they came out again.'' Regarding this instance, he does not claim to have made a smell check of the room or to have made any report about the matter. Finding the three together in the room later that morning with cigars in their mouths, assertedly he admonished them that smoking was against the rule and, when they professed ignorance, provided each with a copy of the plant code of conduct.

The account of the three affected employees differs radically from that of Hoover. They claim not to have been together on breaks on January 6 except for a 20-minute lunch period in the ''smoking'' breakroom when other employees were present and at the 3 p.m. shift change when they and others doffed protective gear after punching out. They deny ever having smoked marijuana in the plant or indeed being users of drugs.

Patton testified that he entered the nonsmoking breakroom 7 a.m. just as Davila came out. He dressed hurriedly because he observed the saw table was adjusted to produce window parts for a company called ''Creation,'' a dangerous labor intensive job. The person who regularly operated the saw (Nicula) was off that day so Patton ran it while Davila removed cut metal. McLaughlin arrived 20 minutes later and helped them until injuring himself about 9:30 a.m. Patton brought the situation to the attention of Hoover who proceeded to administer first aid, taking McLaughlin to the nonsmoking breakroom and then to his office. Another employee (Don Cicone) was assigned to help with production and the pace was such that no one took a break until lunchtime at 1 p.m.

For his part, Stipetich explained that he was a one-half-hour late for work on January 6, arriving at 7:30 a.m. and having Foreman Chise endorse his timecard. After changing in the nonsmoking breakroom, he went immediately to his station where he worked through until between 10 and 11 a.m. when he took a 10-minute break in the smoking room with an employee who worked with him all day, John Vanavash.

At midmorning on January 7 Stipetich, Patton, and Davila were on break together in the nonsmoking room. Hoover entered and Stipetich, concerned that he was late 2 days in a row, asked him if he could be disciplined. Hoover went into his office and promptly returned with a code of conduct manual and pointed out provisions relating to tardiness. He also gave copies to Patton and Davila.

Shortly thereafter Hoover escorted the three to the front office where the vice president in charge of personnel Robert Cene Jr. interviewed each separately in the presence of Hoover, President Robert Cene Sr., and Vice Presidents Paul Cene and DiBacco.

Cene told them only that a supervisor had detected the odor of marijuana in the nonsmoking breakroom shortly after the day shift began on the previous day. He did not mention any other times or that the supervisor had seen them exit the room hurriedly about 7:30 a.m. The employees' answers to him were consistent with their testimony in this proceeding.

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[5] Hoover is responsible for all extrusions produced in a building housing ''Press 2.'' Four shift foremen report to him, including James Chise and Tom Harklerode. He also administers payroll entries and issues paychecks to all employees under his supervision. These include 11 who work the day shift and among those are the 3 alleged discriminates.

[6] Employee lockers are located in the nonsmoking breakroom. An adjacent ''smoking'' breakroom is equipped with a refrigerator and coffee/soda machines.

[7] Hoover could not recall the time of day he told Cene Jr., but thinks it was ''before noon.'' Cene Jr. testified to the same effect but on reviewing his prior affidavit conceded that Hoover may have come after lunch.

In effect, they denied being in the room together that day or having smoked marijuana there. Asked whether they would submit to a drug test, each declined. At the end of each interrogation Cene handed the employee a previously prepared written ''warning report'' stating that the employee was ''suspended for investigation of use of illegal drugs on company premises,'' and a security officer (Howdie Heldman) escorted them out of the plant.[8]

After conferring with his father and the other vice presidents and obtaining their agreement, Robert Cene Jr., without any further investigation, sent each of the suspected employees a letter dated January 11 in which he advised them that ''Based upon its investigation into the incident at Press #2 on January 6, the company has decided to terminate your employment effective on the date of this letter.''

In light of Respondent's antiunion animus manifested by the unfair labor practices found above, its awareness that the three employees were union activists, and their discharge shortly before an announced representation election, a prima facie showing has been made that protected or union activity by the employees was a motivating factor in Respondent's decision to suspend and discharge them. Accordingly, under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the burden is on Respondent to demonstrate that the same actions would have been taken in the absence of the employees' union activities and support.

I find it has not met this burden because I am not persuaded that the pertinent sequence of events that led to their discipline was based on anything other than a fabrication by an overzealous, antiunion[9] supervisor.

The problems presented by Supervisor Hoover's account are many. Among other things, he would have us believe that three known union supporters, who had worked for the Company for many years without any apparent history of drug abuse, gathered together on four or five occasions on 2 consecutive days just prior to an announced representation election under circumstances suggesting repeated use of marijuana during working hours. He did not confront them but instead allowed them to continue to perform admittedly dangerous work. Nor did he advise anyone in higher management of his suspicions until at least 4 hours after the first claimed incident.

Also, it does not appear that he alerted other supervisors. They might have averted potential accidents and corroborated the claimed suspicious sightings. Chise in particular could have rebutted the claim that heavy production on January 6 prevented Patton and Davila from taking any breaks other than at lunchtime because he was their immediate foreman. But none of them testified.

Similarly unexplained is the absence as a witness of injured employee McLaughlin. As noted above Hoover was assisting him to the breakroom for first aid when the initial incident allegedly occurred. McLaughlin therefore was in a unique position to verify Hoover's claim that three employees furtively rushed out and that the smell of marijuana lingered in that room.

Then there is the matter of head saw operator Nicula. Hoover states that Nicula was the one who called his attention to McLaughlin's injury. But Patton claims that Nicula was out that day and that Patton ran the saw and was the one who notified Hoover of the injury. Although uniquely within knowledge of the Company through timecards or otherwise, the question of Nicula's presence (or absence) was not resolved. And again I note that Chise, who could have verified whether or not Patton was the lead saw operator that day, did not appear as a witness.[10]

In these circumstances, and having found credible the denials of the alleged discriminatees,[11] I conclude that they are not shown to have engaged in misconduct and that they were suspended and discharged due to false information provided by Supervisor Hoover in a misguided effort to assist the Company in defeating unionization.

Accordingly, I find that the disciple imposed by higher management was unlawful even assuming they acted in good faith in relying on Hoover's misrepresentations. Under Section 2(13) of the Act ''an employer is bound by the acts and statements of its supervisors whether specifically authorized or not.'' *Dorothy Shamrock Coal Co.*, 279 NLRB 1298, 1299 (1086); *Ideal Elevator Corp.*, 295 NLRB 347 (1989).

On this record, however, I find ample reason to, and do, conclude that higher management was more interested in ridding itself of known union supporters than ascertaining whether the employees were guilty of misconduct.

Admittedly a patently dangerous situation is created if and when employees working in close proximity to metal cutting machinery use drugs; and the offense warrants immediate termination under the Company's code of conduct. Yet, when on January 6 Hoover told Personnel Manager Cene Jr., 3 hours after the event, about the activists' hasty exit from a room reeking with marijuana Hoover was not chided for or even asked why he had waited so long to make the report,

[8] After leaving the interview room, Patton returned a few minutes later, opened the door, and announced, ''Well, sometimes in the morning I smoke marijuana on the way to work, maybe that is what you smelled.'' Assertedly he did so at the prompting of Heldman ''to say something'' to save his job. Patton testified that he had not smoked marijuana but said so in the hope that ''Maybe that way they would just leave us alone.''

[9] As noted above Hoover and a foreman (Harklerode) under his supervision in separate instances each engaged in intimidating conduct by soliciting employees to resign rather than engage in union activities.

[10] Hoover also testified that after the three employees were terminated he observed Patton and Davila driving behind him on Main Street, that later in the evening he received threatening calls from someone whose voice he could not identify, and on the same day reported those incidents to the police. Those matters, assuming they occurred, provide at best a tenuous basis for inferring misconduct on the part of the three employees. Further, Hoover's credibility is not enhanced by his claim that the incidents and report occurred on January 16. The police report (R. Exh. 3) sets the date as 1–12–93. Although the year patently should be 1994 and results from a common year-end mistake, the date 1–12 occurs several times and at one point correctly designates that day as a Wednesday. Hoover's insistence appears due to his perception that the employees might not have known of their terminations until after January 12.

[11] Between January 11 and 17 each of the three employees had their urine tested under controlled conditions. Laboratory reports (G.C. Exhs. 26, 27, 29, and 31) show no drugs, including marijuana in their systems. Although I do not regard the results as conclusive, they are consistent with the employees' denials and, together with other matters discussed above, lead me to conclude that they did not use marijuana on January 6.

why he had allowed the three employees to continue working, and why he had not alerted the plant security detail. Instead, Cene simply told him to monitor the situation and, without himself alerting security or doing anything further that day, made haste to relay Hoover's observations to fellow Vice Presidents Paul Cene and DiBacco. And despite the statement in suspension notices given the three employees on January 7, admittedly no investigation was ever conducted beyond their successive five on one interviews on that date.

Those interviews, again admittedly, elicited no significant contradictions or disparities in the employees' denials of marijuana use at the plant and accounts of their activities on January 6.[12] Accordingly, the collective decision to terminate them was based entirely on Hoover's fabrications.

Any reservation of mine concerning management acquiescence, indeed complicity, in the stratagem is dispelled by Patton's father, Charles Patton Sr., whose testimony I find credible against the background of the record as a whole. Concerned about his son's suspension, he called Respondent President Robert Cene Sr. (whom he knew as a fellow parishioner) on Sunday, January 7. In response to his inquiry concerning why the suspension was imposed, Cene Sr. told him it was because of suspicion of marijuana use. He also asked, ''Do you know that they are trying to organize a union?'' and he repeated several times, ''if he was a good boy, then there's no problems, but if he was a bad boy, then there would be some problems.'' I infer from his mentioning the organizing drive that Cene Sr. was suggesting that further disciplinary action might not be taken if the son promised to forgo union activity.

I find the suspensions and discharges unlawfully discriminatory as alleged in paragraphs 10 and 12 of the complaint.

CONCLUSION OF LAW

Respondent is shown to have violated Section 8(a)(1) and (3) of the Act in the particulars and for the reasons stated above, and its violations have affected, and unless permanently enjoined will continue to affect, commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Among other things, it must offer the unlawfully discharged employees immediate reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[12] Patton's statement to the interviewers (''Well, sometimes in the morning I smoke marijuana on the way to work, maybe that is what you smelled.'') does not admit use on company premises.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, Astro Shapes, Inc., Astro Coatings, Inc., Struthers, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Engaging in unlawful surveillance of employees engaged in protected union activities.

(b) Soliciting employees to resign rather than seek union representation.

(c) Discharging or otherwise discriminating against employees for supporting Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 377 or any other union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Robert Stipetich, Ralph Davila, and Charles Patton immediate and full reinstatement to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(b) Remove from all files any reference to their unlawful suspensions and discharges and notify them in writing that this has been done and that the suspensions and discharges will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its plant in Struthers, Ohio, copies of the attached notice marked ''Appendix.''[14] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''